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Nos. 82-623 and 82-624

In the Supreme Court of the United States

OCTOBER TERM, 1982

TREASURE ISLE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

G. CECIL HARTLEY AND TRAVIS DELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a corporation may be both a defendant and the "enterprise" in a prosecution for violating 18 U.S.C. 1962(c).

2. Whether petitioners were denied a fair trial because potential evidence (i.e., shrimp sold by petitioner Treasure Isle to the government) was consumed before its evidentiary potential was or reasonably could have been known.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a)[1] is reported at 678 F. 2d 961. The order of the district court (82-624 App. 3a-11a) denying petitioners' motions to suppress evidence and to dismiss the indictment is not reported.

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[1] "Pet. App." refers to the appendix filed jointly by petitioners with this Court. "82-624 App." refers to the appendix attached to the petition in No. 82-624.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1982. Petitions for rehearing were denied on September 8, 1982. The petition for a writ of certiorari was filed on October 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of all charges in a 33-count indictment charging them with conspiracy to defraud the United States, in violation of 18 U.S.C. 371 (Count 1); mail fraud, in violation of 18 U.S.C. 1341 (Counts 2-18); interstate transportation of money obtained by fraud, in violation of 18 U.S.C. 2314 (Counts 19-32); and conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), a provision of the RICO statute (Count 33).[2] Petitioners Hartley and Dell were sentenced to one year's imprisonment, to be followed by three years' probation. Petitioner Hartley was also fined $25,000. Petitioner Treasure Isle, Inc., was fined a total of $167,000 on the first 32 counts. On the RICO count, the only sentence imposed was that the corporation was required to furnish the services of a company executive for 10 hours per week for 50 weeks to assist at a training center for mentally retarded and physically handicapped persons (Pet. App. 2a-3a, 60a).

The indictment charged that petitioners engaged in a complex scheme to circumvent inspection procedures and to defraud the United States by intentionally selling the Department of Defense substantial quantities of shrimp that were smaller than specified in the purchase contract,

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[2]The offenses charged in Counts 1-32 formed the predicate racketeering activity in Count 33.

improperly peeled and deveined, and covered with an excessive amount of bread crumbs. Petitioner Treasure Isle, Inc., a publicly held corporation, was alleged as the "enterprise" in the racketeering count. Petitioner Hartley, a vice-president of Treasure Isle whose responsibilities included supervision of production, and petitioner Dell, Treasure Isle's plant manager, were charged together with Treasure Isle as defendants (Pet. App. 2a-3a, 49a n.41).[3]

1. The evidence at trial established that the Department of Defense began purchasing shrimp from Treasure Isle in the 1960's. Prior to 1974, military inspectors made an individual examination of each box of raw shrimp and every tank of peeled shrimp prior to breading. If the shrimp satisfied the inspection criteria,[4] a card would be placed on the box or tank indicating acceptance; if it did not, it would receive a "reject" card. At the direction of petitioner Dell, Treasure Isle employees surreptitiously removed "reject" cards from inspected tanks, replaced them with "accept" cards taken from other tanks, and destroyed the "reject" cards. Similarly, at the direction of petitioners Hartley and Dell, Treasure Isle's cooler foreman switched the inspectors' cards on boxes of raw shrimp. Thus, shrimp already accepted would be reinspected only to be approved once again, while previously rejected lots bearing "accept" cards would continue in production (Pet. App. 4a).

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[3]Robert L. Patterson, Treasure Isle's personnel and assistant plant manager, was also named as a defendant but was acquitted on all counts (Pet. App. 3a n.4).

[4]The criteria included requirements that the shrimp be free of foreign matter, dehydrated areas, black spots, and other major defects. The criteria also specified unacceptable levels of minor defects, such as shells, veins, and shrimp fragments in the finished product, and provided that breading could account for no more than 50% of the processed shrimp's total weight (Pet. App. 2a n.3; Tr. 93-94, 766).

In addition, at the direction of petitioners Hartley and Dell, a Treasure Isle employee removed two and one-quarter ounces from a five-pound counterweight used by military inspectors in determining the number of shrimp per pound, thus making the inspected shrimp appear to be larger than they actually were. On several occasions, petitioners Hartley and Dell directed company employees to inform the inspectors falsely that the inspectors had miscounted boxes of inspected shrimp. They also told the employees to process additional lots of shrimp at night and to introduce the uninspected shrimp into production without being detected. Treasure Isle employees also falsified production sheets in order to permit after-hours production and thus evade military inspection altogether (Pet. App. 4a-5a; Tr. 868-875, 3629-3644).

In October 1974, the government changed its system at the Treasure Isle plant from an "on-line" inspection to a random "end product" inspection. Under the new system, inspectors selected 13 boxes of breaded shrimp from each day's production and stored them in a locked freezer overnight for analysis the following day. Each box was specially marked by the inspectors before being placed in the freezer, for which only the inspectors were supposed to possess a key. If analysis of the 13 sample boxes established that the shrimp conformed to specifications, the inspectors approved the entire production lot for that day (Pet. App. 5a).

Shortly after the new inspection system was instituted, an entire production lot was rejected. Petitioners Hartley and Dell then devised and instituted a new scheme to prevent rejection of shrimp by "sample switching." Each day a "sample run" was made in which the largest shrimp were meticulously processed until 20 boxes had been filled. The "sample run" was then set aside until the evening, when production returned to normal, using smaller shrimp, less

careful cleaning, deveining, and freezing, and extra breading. Each night, at the direction of petitioners Hartley and Dell and utilizing a key Dell had obtained, Treasure Isle employees sneaked into the locked freezer, duplicated the military inspector's markings on the "sample run" boxes, and substituted them for the boxes selected by the inspectors earlier that day. Thus, the shrimp tested by inspectors the next day falsely indicated that the company's production for the previous day met government specifications (Pet. App. 5a-6a).[5]

Petitioners used a variety of other means to carry out their scheme. When large batches of shrimp developed a foul odor, petitioners Hartley and Dell directed employees to add a chlorine solution to the tanks so the shrimp could be processed and frozen undetected. Rejected shrimp were secretly added to other production lots. False counts of the number of pallets of finished lots were given to inspectors so that uninspected shrimp could be included. And the company developed signals to warn employees when inspectors were approaching the work areas. Liquor, money and large quantities of boxed shrimp were used by petitioners Hartley and Dell on several occasions to bribe military inspectors to falsify reports (Pet. App. 6a).[6]

2. Petitioners' fraudulent scheme began to come to light in December 1977, when military inspector David Klopp noticed a difference in the markings of the sample boxes secured for inspection and those removed for analysis the following day. The next day he made special markings on

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[5]See also Tr. 765-767, 783-799, 815-838, 1277-1281, 1293-1298, 1525-1557, 1614-1618, 1691-1692, 1717-1722, 1740-1759, 2042-2055, 3488-3496, 3512, 3524-3528, 5167-5171.

[6]See also Tr. 860-875, 886-908, 1552, 1676, 1723-1738, 3106-3107, 3113-3160, 3267-3280, 3531-3536, 3649, 3666-3675, 3719, 4943-4959, 4970-4976, 5001-5006.

the randomly selected boxes before placing them in the freezer; he found that the boxes he removed the following morning did not bear his markings. Inspector Klopp repeated the experiment on several subsequent occasions and again found that the boxes removed for inspection lacked the special markings (Pet. App. 7a; Tr. 2260-2269, 2307-2339).

After receiving Inspector Klopp's information, the Department of Defense began a criminal investigation that revealed that the random samples selected by Klopp and bearing his special markings had been placed back into military shipments designated production lots F6968 and F7008. Lot F6968 was located and secured in Watertown, Massachusetts, and was subsequently tested there by military and civilian analysts. Portions of lot F7008 were located, secured, and tested in Norfolk, Virginia, and Fort Worth and San Antonio, Texas. The analysis established that the samples failed to conform to specifications (Pet. App. 7a).[7]

ARGUMENT

1. Petitioner Treasure Isle contends (82-623 Pet. 6-10)[8] that because it was alleged as the "enterprise" in the RICO count, it could not also be charged as a defendant in that count.[9] The RICO statute makes it unlawful for "any person employed by or associated with any enterprise * * * to

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[7]The samples were smaller than represented, contained unacceptable levels of shells, veins, and black spots, were excessively breaded, and in some cases contained large breaded chunks of ice (Tr. 4002-4006, 4030-4031, 4326-4342, 4449-4470).

[8]Petitioners Hartley and Dell join in Treasure Isle's petition (82-623 Pet. 3 n.3; 82-624 Pet. 2), but the contention discussed in this point, even if meritorious, would not impugn the validity of their convictions.

[9]Count 33 of the indictment charged that petitioners, "being employed by and associated with an enterprise * * * to wit: Treasure Isle, Inc., conducted and participated, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity"

conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of reacketeering activity" (18 U.S.C. 1962(c)). The term "person" is defined by the statute to include "any individual or entity capable of holding a legal or beneficial interest in property" (18 U.S.C. 1961(3)), and the term "enterprise" is defined to include any corporation (18 U.S.C. 1961(4)). Petitioner Treasure Isle, a corporation capable of holding an interest in property, is clearly within the statutory definitions of both "person" and "enterprise." Accordingly, petitioner Treasure Isle falls within the plain meaning of the statute (see Pet. App. 53a), and no provision of the RICO statute immunizes from prosecution the person or entity charged as the enterprise. Where, as here, "the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (quoting *Consumer Product Safety Commission* v. *G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

While it might seem odd in ordinary speech to say that an entity or person participated in its or his own affairs through a pattern of racketeering activity, it appears clear that the draftsmen of the RICO statute intended to make such conduct criminal. A contrary interpretation would leave a glaring and unreasonable gap in the statutory coverage. In many RICO prosecutions, the enterprise is itself a culpable entity—often the most culpable actor in the criminal operation. It makes no sense to say that if the most

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(Pet. App. 49a n.41). Petitioner's claim affects only its conviction on Count 33. All of the evidence at trial would have been admissible whether the indictment had contained a RICO count or not, since the predicate offenses in the other 32 counts were all charged as substantive violations of federal statutes and were all properly joined in a single indictment under Fed. R. Crim. P. 8 as part of the same common scheme or plan.

culpable participant in the criminal venture is also the enterprise through which that venture is being run, that participant is immune from prosecution under the RICO statute. This point is perhaps best made if the enterprise is an individual, something expressly permitted by the statute. See 18 U.S.C. 1961(4). If a group of persons are engaged in a pattern of racketeering activity in conjunction with a central figure, and if that figure is the "enterprise" with whom the others are associated and whose affairs they are conducting through a pattern of racketeering activities, it makes little sense to suggest that the associated persons could be charged under RICO but that the central figure could not.

In addition, as the court of appeals recognized (Pet. App. 55a-57a), the government could have avoided petitioner's objection to the pleadings by alleging that the enterprise was an association in fact comprised of the individual defendants and Treasure Isle. See *United States* v. *Thevis*, 474 F. Supp. 134, 137 (N.D. Ga. 1979), aff'd, 665 F. 2d 616, 625 (5th Cir.) (RICO enterprise may be a "group of individuals associated in fact with various corporations"), cert. denied, No. 81-2025 (June 1, 1982). This form of pleading the enterprise has been approved by this Court and others. See, e.g., *United States* v. *Turkette, supra*, 452 U.S. at 578-579; *United States* v. *Winter*, 663 F. 2d 1120, 1124-1125 (1st Cir. 1981); *United States* v. *Griffin*, 660 F. 2d 996, 997 (4th Cir. 1981), cert. denied, No. 81-5780 (Jan. 11, 1982); *United States* v. *Elliott*, 571 F. 2d 880, 898 (5th Cir.), cert. denied, 439 U.S. 953 (1978). "[T]here is no logical or statutory reason to force the government to choose between alternative enterprise theories * * * as long as the indictment is otherwise sufficient." *United States* v. *Stratton*, 649 F. 2d 1066, 1075 (5th Cir. 1981); see also *United States* v. *Thompson*, 685 F. 2d 993, 998-1000 (6th Cir. 1982), cert. denied, *sub nom. Sisk* v. *United States*, No. 82-5440 (Dec. 6, 1982). It is the policy of the Department of Justice that it

will no longer approve indictments cast in the form employed in the present case except in extraordinary circumstances.

Accordingly, the issue raised by petitioners is of little if any practical importance and does not warrant this Court's review. This is especially so since the only sentence imposed upon petitioner Treasure Isle under the RICO count—providing nonmonetary assistance to a training center for the mentally and physically handicapped—is not onerous.[10]

2. Petitioners Hartley and Dell contend (82-624 Pet. 16-25)[11] that they were denied a fair trial by the consumption of certain shrimp sold by Treasure Isle, Inc., to the Defense Department. They claim that the consumption prevented them from rebutting, through independent testing, the testimony of government experts that shrimp sold under the government contract was defective. They also state that the shrimp made available to them could not be tested satisfactorily due to improper maintenance by the government. Petitioners claim that there is a conflict among the courts of

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[10]For these same reasons, review is not justified by the asserted conflicts with the decisions of other courts of appeals upon which petitioner Treasure Isle relies (82-623 Pet. 9-10); Supp. 1-3 ("Supp. refers to the "Supplemental Brief" filed in support of the petition in No. 82-623). While we acknowledge that the decision below conflicts with *United States* v. *Computer Sciences Corp.*, 689 F. 2d 1181 (4th Cir. 1982), the other cases upon which petitioner Treasure Isle relies concern civil complaints, and their reasoning would not necessarily extend to criminal cases as well. In *Bennett* v. *Berg*, 685 F. 2d 1053 (8th Cir. 1982), the only other court of appeals case cited by petitioner, the court specifically distinguished the holding of the court below as "a somewhat different result in a unique context in a criminal case" (685 F. 2d at 1062). See also *Fields* v. *National Republic Bank*, 546 F. Supp. 123, 124 n.5 (N.D. Ill. 1982) (decision below "would not necessarily extend to civil actions").

[11]Petitioner Treasure Isle, Inc., joins in the Hartley and Dell petition (82-623 Pet. 10).

appeals with respect to the applicable legal standard under such circumstances. These claims are without factual or legal merit.

a. In January 1978, the Department of Defense began its investigation of the inspection system at Treasure Isle, following Inspector Klopp's report that inspection was being subverted by the switching of samples. The investigation focused on production lots F6869 and F7008, since those lots contained boxes of shrimp bearing the special markings inscribed by Inspector Klopp. Thus, those lots were known to contain shrimp that had been selected for inspection but had circumvented testing through the sample switching scheme (Pet. App. 32a-33a; 82-624 App. 5a-6a).

The two production lots were traced to their destinations—Watertown, Massachusetts; Norfolk, Virginia; and Fort Worth, Texas—and were secured for testing. On three separate occasions in the spring of 1979, inspectors tested the shrimp in the two production lots, including the boxes bearing Inspector Klopp's markings; these inspectors testified for the government concerning the nonconformity of the shrimp (Pet. App. 32a-33a; 82-624 App. 6a).

In the meantime, other lots of shrimp sold to the Defense Department by Treasure Isle were consumed in the ordinary course of the military supply system. Thus, by mid-1979, when the government finally became aware of the magnitude of the fraud,[12] all of the shrimp sold to the Defense Department during the relevant period had been consumed, except for production lots F6869 and F7008, which had been retained (*ibid.*).

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[12]It was not until April 1979, when an investigator interviewed a former Treasure Isle employee, that the government learned that Treasure Isle had supplied nonconforming shrimp to the Defense Department on a regular, daily basis for an extended period of time (Tr. 997).

In May 1979, petitioners learned of the government's ongoing investigation. Counsel for petitioner Hartley subsequently requested that the government secure and preserve the recently produced shrimp. The government responded that most of the shrimp had been consumed but extended petitioner the opportunity to inspect production lots F6968 and F7008 prior to the return of the indictment. Petitioner Hartley and his attorney inspected and tested shrimp on hold in Norfolk, Virginia. The government also offered petitioners an opportunity to inspect and test recently produced shrimp located in San Antonio, Texas, but petitioners declined, stating they were dissatisfied with the testing procedures mandated by the government. Following the return of the indictment, the government transported the remaining shrimp samples from production lots F6968 and F7008 to Tampa, Florida, where petitioners were given an additional opportunity to test them. They again declined, contending that improper handling of the shrimp by the government had rendered the samples untestable (Pet. App. 33a; 82-624 App. 6a-7a).[13]

Following an evidentiary hearing, the district court denied petitioners' motions to dismiss the indictment and suppress test results. The court of appeals affirmed, stating (Pet. App. 35a):

> While the consumption of the shrimp was "intentional", [sic] there is no evidence that there was an improper governmental motive in this case. * * *

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[13]As the court of appeals observed (Pet. App. 33a n.26), "[t]hroughout the trial the issue of whether the remaining samples of shrimp were 'testable' was hotly contested. The [petitioners'] expert witness testified that the product had been allowed to thaw and refreeze precluding an accurate examination of its weight and breading percentage. The government produced evidence that the product had not significantly thawed and was capable of testing for other defects (veins, black spots, shells) outlined in the military specifications."

> [O]nce that shrimp was purchased it was not unreasonable for it to be consumed. * * * [Petitioners] failed to sufficiently establish that there was intentional or even negligent conduct on the part of the Government agents which has caused the shrimp to be untestable for pertinent characteristics.

b. The courts below properly concluded that there was no impropriety on the government's part in permitting the shrimp to be consumed.[14] The shrimp at issue was worth millions of dollars and was produced and consumed long before the government became aware of the fraudulent activities that were occurring daily at Treasure Isle. It would have taken an extraordinary degree of prescience for the government investigators who were looking into the sample switching involving two lots of shrimp to foresee that the investigation would reveal a wholesale fraud of the degree that ultimately surfaced. Thus, this was not a case of the government acting negligently or intentionally to deprive petitioners of evidence that might have been helpful to them; rather it was a case in which material that now appears to have been potentially useful to one side or the other was lost through no fault of either party.

As this Court recognized in *United States* v. *Augenblick*, 393 U.S. 348, 355-356 (1969), where evidence is not deliberately suppressed but is nevertheless lost or destroyed, the proper focus is not solely on the potential prejudice to the defendant, but also upon the government's culpability. Where the government presents a valid, non-pretextual explanation, the loss or destruction "[does] not rise to a constitutional level" of a denial of due process or the right to

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[14]The shrimp was a perishable product with a shelf life of approximately eight months (Tr. 6882-6883).

a fair trial.[15] *Ibid.*; see also *Killian* v. *United States*, 368 U.S. 231 (1961). In a closely analogous context, this Court has held that investigative delay resulting in the loss of evidence does not entitle a defendant to relief unless the delay is designed to gain a tactical advantage over the accused. *United States* v. *Lovasco*, 431 U.S. 783, 795 (1977); *United States* v. *Marion*, 404 U.S. 307, 324 (1971). In this case, the delay between the beginning of the investigation in early 1978 and its culmination in the summer of 1979 was attributable to the gradual expansion of the investigators' knowledge of the scope of the offense, not to any tactical decision designed to benefit the prosecution. In short, for most of the period of the investigation, the government was not aware that the scope of the fraud was such that every lot of shrimp produced by Treasure Isle could ultimately be of evidentiary value in the case.

Even if the government should have recognized that all the shrimp produced before 1978 could have some evidentiary value, the consumption of the shrimp would not entitle the appellants to relief. Following *Augenblick*, the courts of appeals have consistently ruled that loss or destruction of evidence by the government does not automatically entitle a defendant to dismissal of the charges against him or to suppression of test results. Rather, such relief can be obtained only where the loss of material evidence was unfairly prejudicial to the defendant and was the result of bad faith action by the government. E.g., *United States* v.

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[15]Petitioners fail to distinguish or even to cite this Court's decision in *Augenblick*. Their reliance (82-624 Pet. 22-23) on *Brady* v. *Maryland*, 373 U.S. 83 (1963), is misplaced, since there was no showing that the shrimp was suppressed or maliciously destroyed by the government or that the consumed shrimp would indeed have been a source of material exculpatory evidence. See *United States* v. *Augenblick*, *supra*, 393 U.S. at 355-356; *Killian* v. *United States*, *supra*, 368 U.S. at 242; *United States* v. *Baca*, 687 F. 2d 1356, 1359 n. 1 (10th Cir. 1982); *United States* v. *Arra*, 630 F. 2d 836, 848 (1st Cir. 1980).

Baca, 687 F. 2d 1356, 1359 (10th Cir. 1982); *United States* v. *Grammatikos*, 633 F. 2d 1013, 1020 (2d Cir. 1980); *United States* v. *Arra*, 630 F. 2d 836, 849 (1st Cir. 1980); *United States* v. *Loud Hawk*, 628 F. 2d 1139, 1146 (9th Cir. 1979), cert. denied, 445 U.S. 917 (1980); *United States* v. *Gantt*, 617 F. 2d 831, 841 (D.C. Cir. 1980); *United States* v. *Gordon*, 580 F. 2d 827, 837 (5th Cir.), cert. denied, 439 U.S. 1051 (1978).[16]

In this case, as the courts below found, there was no bad faith, or even negligent conduct, on the part of the government. Nor was there prejudice to petitioners. The gravamen of the offense in this case was a fraudulent scheme to subvert the military inspection system; it was not essential for the government to show that the scheme actually resulted in loss to the military by receipt of non-conforming shrimp. Nonetheless, a number of witnesses testified that the shrimp being shipped to the military during the period of the conspiracy were non-conforming. The fact that the preservation of the shrimp might have made cross-examination of those witnesses easier for petitioners does not constitute a showing of prejudice sufficient to justify reversal. See *United States* v. *Love*, 482 F. 2d 213, 220 (5th Cir.), cert. denied, 414 U.S. 1026 (1973); *United States* v. *Young*, 535 F. 2d 484, 488 (9th Cir.), cert. denied, 429 U.S. 999 (1976);

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[16]Thus, petitioners' claim (82-624 Pet. 16-22) of a conflict among the courts of appeals on this issue is without basis. The court of appeals below expressly recognized (Pet. App. 34a), in accordance with the decisions of this Court and others, that

> "[w]hether a defendant has been deprived of this right of due process [to necessary, material evidence] will depend upon the materiality of the evidence, the likelihood of mistaken interpretation of it by government witnesses or the jury, and the reasons for its nonavailability to the defense" [quoting *United States* v. *Herndon*, 536 F. 2d 1027, 1029 (5th Cir. 1976)].

The differences in decisions cited by petitioners are semantic and do not reveal any conflict with respect to the test to be applied.

United States v. *Sewar*, 468 F. 2d 236 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973). This is particularly true in light of the fact that the government preserved portions of the shrimp from two of the contract lots and offered petitioners the opportunity to test the shrimp on several occasions, even before the return of the indictment. See *United States* v. *Love, supra.*

Under these circumstances, the courts below properly held that petitioners were not unfairly prejudiced or denied due process by the actions of the government, and this fact-bound conclusion does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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